SUPREME COURT, U. S.

FILED

JAN 20 1969

JOHN F. DAVIS, CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1968**

## No. 748

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THORNTON A. JENKINS,

*Petitioner,*

v.

THE STATE OF DELAWARE,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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## BRIEF FOR THE PETITIONER

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# BRIEF FOR THE PETITIONER

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## Opinions Below

The opinions of the Supreme Court of the State of Delaware (A 52 and A 98) are reported at 230 A. 2d 262 and 240 A. 2d 146.

## Jurisdiction

The final judgment of the Supreme Court of the State of Delaware was dated March 12, 1968 and was entered on March 14, 1968 (A ). The Petition for a Writ of Cer-

tiorari was filed on May 3, 1968, and was granted on November 18, 1968. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257(3).

## Constitutional Provisions Involved

The constitutional provisions involved are the Fourth Amendment, Fifth Amendment, Sixth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States, which are set forth in Appendix A.

## Questions Presented

I. Whether *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) requires that the retrial of a defendant commenced after June 13, 1966 be conducted in conformity with the standards specified in *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

II. Whether a warrantless search of a suspect's residence based solely upon the consent of a joint occupant is barred by the Fourth and Fourteenth Amendments, where the suspect was in custody and immediately available to give or withhold his consent and where the specific purpose of the search was to obtain evidence to be used against him.

## Statement of the Case

The Petitioner and his common-law wife,[1] Leona Marshall, had lived together for approximately four years

[1] The term "common-law wife" is not used in the technical sense. Common-law marriages are not recognized in Delaware. *Owens* v. *Bentley*, 1 Terry (40 Del.) 512, 14 A. 2d 391 (Super. Ct. 1940).

prior to the Petitioner's arrest on March 17, 1965 (A 82). Some two or three years before the Petitioner's arrest, they had rented a dwelling at 617 East Fifth Street in Wilmington, Delaware (A 39, 81). The owner of the property carried Miss Marshall's name as the tenant to whom the property was rented (A 42). However, except for monies received from a roomer, the initial rental deposit and monthly rental charges were all paid for by the Petitioner (A 85).

On the morning of March 17, 1965, officers of the Wilmington Police Department discovered the victim of an apparent homicide in a junkyard (A 46). The Petitioner and a companion had been seen and apprehended by police officers at a point in the vicinity of the junkyard on the evening of March 16, 1965 (Tr. A 17-21; Tr. B 41-43).[2] Following discovery of the victim's body, police officers went to the Petitioner's East Fifth Street residence for the purpose of apprehending the Petitioner and his companion of the prior evening (A 13-15, 74).

Five police officers arrived at the Petitioner's residence at approximately 9:45 A.M. (A 74, 78). Sergeant Mackey went to the rear of the dwelling and apprehended the Petitioner in the rear yard (A 17, Tr. B 58). Sergeant Maloney knocked on the front door and was admitted by Leona Marshall (A 16, 74), who was dressed in a housecoat, or similar garment (A 18, 76). Sergeant Maloney asked for the Petitioner (A 16, 74). The persons in the house and the Petitioner were collected in the dining room, where

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[2] As used herein, Tr. A designates references to the record of Petitioner's first trial and Tr. B. to the record of Petitioner's second trial.

she observed the Petitioner and another man being directed by the police to lean against the wall (A 83). Leona Marshall was told by Sergeant Maloney to get dressed (A 30, 83), and that they were "all going downtown" (A 29, 83). No search was made of the house at that time (A 16).

The Petitioner, Miss Marshall and the other persons in the house were taken into custody and removed to the Detective Division of police headquarters (A 20, 78). Miss Marshall was seated on a bench immediately outside the Detective Division and the Petitioner was placed in a separate "recording room" (A 21, 78-79).

Shortly after arriving at the Detective Division, Miss Marshall was taken into the main area of the Detective Division, where Sergeant Maloney talked to her (A 21). At the time, the Petitioner was still situated in the recording room, which was in the same confine as the main area of the Detective Division (A 78). Although he was aware of the fact that the Petitioner and Miss Marshall lived together at the East Fifth Street house as common-law man and wife, Sergeant Maloney never did ask the Petitioner for his permission to search the house (A 25, 79-80).

At approximately 11:40 a.m. on the morning of March 17, 1965, Sergeant Maloney advised Miss Marshall that the police were investigating a burglary and a murder[2] (A 21, 25, 79) and asked for permission to search the property (A 21, 31-32, 79). Miss Marshall said "yes" (A 28). The evidence is conflicting upon whether or not Miss Marshall was told that she did not have to permit the police to search

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[2] Miss Marshall testified that this advice was not given until later (A 83-84).

the house (A 21, 31-32, 79, 83-85).* For her part, Miss Marshall testified that she "didn't know exactly what to do" when her permission to search the property was sought (A 83) and that as far as she was concerned, she had no choice but to consent (A 32, 84). As Miss Marshall phrased it, although she was apparently not frightened by the situation (A 35), ". . . they still hadn't told us what it was all about, so I just told them to go ahead in and search it" (A 83).

In the meantime, the Petitioner remained in police custody in the recording room of the Detective Division. At 11:00 a.m. on the morning of March 17th, he was formally charged with night prowling, and at 1:15 p.m. he was formally charged with burglary in the fourth degree and murder in the first degree (A 49, 96). But even prior to the time when the police apprehended the Petitioner at his home, it was clear to them that they were investigating a homicide and that the Petitioner was "considered a prime suspect" (A 13-14, 25, 79-80).

Pursuant to the permission obtained from Miss Marshall, Sergeant Maloney and Sergeant Gregg searched the Petitioner's East Fifth Street house (A 15). They seized a number of items of junk from the basement, and a jacket allegedly belonging to the Petitioner was taken from the bedroom which he and Miss Marshall occupied (A 15). The junk was identified as having come from the junkyard where the homicide victim was discovered (Tr. B 52-53).

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* "I advised her of her rights and requested permission to search the house. This permission was granted" (A 15). "I once again explained to her in the presence of Sergeant Gregg that it wasn't necessary for her, if she didn't desire to, to let us search the house" (A 15).

The jacket, which was stained with human blood of the same type as the homicide victim (Tr. B 154), was admitted into evidence together with the other items seized from the cellar of the house (Tr. B 133, 158).

The Petitioner was interrogated three times on March 17, 1965, by Detective Sergeant John Ogden—11:30 a.m., 2:50 p.m., and 7:05 p.m. At no time was the Petitioner advised by Sergeant Ogden of his right to have counsel supplied him if he was unable to afford counsel of his own choice (A 46, 47-48, 91). At 7:15 p.m. Sergeant Ogden obtained an incriminating statement from the Petitioner (A 90), which was later admitted into evidence (Tr. B 147).

The Petitioner was indicted by the Grand Jury on June 8, 1965 (A 1, dkt. entry A 1), the indictment charging him and a co-defendant with murder in the first degree, as well as other offenses (A 5-8). The Petitioner filed timely motions to suppress the evidence comprised of the product of the search of his residence on March 17, 1965 (A 9-10) and the statement obtained from him that same day (A 11-12). Both motions were denied at the beginning of Petitioner's trial (A 61, 65).

The Petitioner's first trial began on January 13, 1966 and resulted in his conviction of burglary in the fourth degree and murder in the first degree (A 1, dkt. entry 36). The Petitioner's conviction of murder in the first degree was reversed by the Delaware Supreme Court upon several grounds: the insufficiency of the evidence to establish the express malice requisite to first degree murder (A 53-56); improper jury instructions in regard to the applicable felony-murder rule (A 56-60) and error in compelling the

Petitioner to be tried jointly with his co-defendant (A 65-68). The Delaware Supreme Court upheld the search as proper (A 61-64) and *sua sponte* determined that *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) did not require the application of the standards prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966) to any retrial of the Petitioner (A 69-70), to which position it adhered following the grant of Petitioner's application for reargument (A 72-73).

The Petitioner's second trial began on October 2, 1967 and resulted in his being convicted of murder in the second degree (Tr. B 3, 225). Upon appeal to the Delaware Supreme Court, the conviction was affirmed (A 98-102).

## Summary of Argument

This Court held in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) that the standards governing police interrogation specified by the *Miranda*[5] and *Escobedo*[6] decisions were applicable to trials begun after the date on which those decisions were announced. Against the background of the basic historical distinction between the retroactive and prospective effect of new decisions, application of the three principal criteria[7] for determining the extent of retroactiv-

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[5] *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

[6] *Escobedo* v. *Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964).

[7] "We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda*." 384 U.S. at 727.

ity confirm what the words in the *Johnson* opinion say. It is all trials subsequent to June 13, 1966 which must be conducted in accordance with *Miranda*'s standards. No exception is carved out for a retrial. To permit such an exception would be to sanction the concurrent trials of criminal defendants by different standards, one of which is inferior to the other (Argument I).

A warrantless search is generally prohibited. Exceptions have been recognized in certain cases of necessity and in the case where there has been a valid consent to the search and thereby an effective waiver of the consenter's Fourth Amendment rights. However, there is no necessity for a warrantless search of a suspect's home when he and his fellow occupants are in police custody, and when he is immediately available to give or withhold his consent to the search. Nor can the legitimacy of such a search rest upon the unknowing consent of the suspect's common-law wife, not only because she is unknowing but more important, because she cannot effectively waive his personal right to be free from an unreasonable search and seizure (Argument II).

## ARGUMENT

### I.

### A Retrial Is a Trial and the Standards of Miranda v. Arizona, 384 U.S. 436, Apply to All Trials Commenced After June 13, 1966.

The Delaware Supreme Court concluded that unless the trial in a given case was to be the first trial of a defendant upon the particular charge involved, and unless that first trial was commenced after June 13, 1966, the requirements enunciated in *Miranda* would not, under *Johnson* v. *New Jersey*, be applicable.[8] It reached this conclusion despite its explicit recognition that the retrial of a defendant is a trial *de novo* and despite the clear specification of *Johnson* that *Miranda*'s standards were to be used for those "persons whose trials had not begun as of June 13, 1966." 384 U.S. at 734.

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[8] "It is our opinion that *Miranda* should not apply at new trial, notwithstanding the fact that it will be held after the June 13, 1966 effective date of *Miranda*. We think it neither logical nor reasonable that the retrial should be conducted under rules different from those prevailing when the cases were tried the first time. In *Johnson* v. *New Jersey*, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966), the United States Supreme Court stated: 'We hold further that Miranda applies only to cases in which the trial began after the date of our decision [June 13, 1966] * * *.' Although *de novo*, a new trial is not a new case; it is a continuation of the original case until the judgment is final. In our opinion, *Johnson* refers to 'cases' the original trial of which commenced after June 13, 1966. Neither *Miranda* nor *Johnson*, in our view, requires the courts of this State to make applicable upon retrial the *Miranda* rules which were not applicable at the original trial." 230 A 2d at 274.

*Johnson*[9] was the third in a trinity of cases dealing with the question of retroactivity, the other two being *Linkletter*[10] and *Tehan*.[11] In *Linkletter*, the Court held that its June 19, 1961 decision in *Mapp* v. *Ohio*[12] was inapplicable to a habeas corpus proceeding commenced after the *Mapp* decision with respect to a state court conviction in 1959 which had become "final." The word "final" was defined as describing circumstances where "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" (381 U.S. at 622, note 5). The primary distinction drawn by the Court between a prospective and retrospective ruling was that the former applied only to the instances where the conviction was not "final." The same basic distinction was drawn in *Tehan* with regard to the rule in *Griffin* v. *California*.[13] In both cases, which were habeas corpus proceedings, the Court treated a retrospective ruling as one which was also applicable to collateral attacks upon a final judgment.

It was against the background of *Linkletter* and *Tehan* that *Johnson* considered both the basic question of retro-

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[9] *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966).

[10] *Linkletter* v. *Walker*, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965).

[11] *Tehan* v. *Shott*, 382 U.S. 406, 15 L. Ed. 2d 453, 86 S. Ct. 459 (1966).

[12] 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

[13] 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965). The decision struck down the propriety of the prosecutor commenting upon the failure of the accused to testify, "because such comment 'cuts down on the privilege [against self-incrimination] by making its assertion costly.'"

activity and the further refinement of the extent of any prospective application of the *Escobedo* and *Miranda* standards. The primary issue of whether those standards should be applied retroactively was evaluated upon the basis of three principal criteria: first, the purpose of the new standards governing police interrogation; second, the reliance which may have been placed upon prior decisions; and third, the effect of a retroactive application of the standards on the administration of justice.

With regard to the first criterion, the Court concluded that the prime purpose of the rulings upon confessions was "to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice" (384 U.S. at 729).

As to the second criterion, the Court found that "law enforcement agencies fairly relied on . . . prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*" (384 U.S. at 731).

Finally, the Court determined that in the context of the third criterion, "retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards" (id.).

Upon the foregoing basis, the Court concluded that these new standards should not be applied retroactively, which is to say that they should not affect those cases in which the conviction was final (384 U.S. at 732). Although, the Court did not attribute a different weight to the three

criteria which it applied in deciding the basic retroactivity question, it manifestly did so in determining whether the prospective application should affect cases on direct appeal and not yet tried at the time the new standards were announced. For here, the Court emphasized the importance of the trial process over a consideration for the police officer who had conducted an in-custody interrogation prior to the *Escobedo* and *Miranda* decisions.

With respect to non-final cases, the Court posed the precise question controlling its decision as being:

> ". . . whether Escobedo and Miranda shall affect cases still on direct appeal when they were decided or whether their application shall commence with *trials begun after the decisions were announced*" (384 U.S. at 732).

The Court was concerned lest its *Miranda* and *Escobedo* decisions be the cause of retrials or release of previously convicted prisoners. But it was equally concerned with providing clear and certain guidelines for the conduct of future fact-finding processes through "trials."

It is difficult to conceive how the Court could have made it clearer that where a criminal defendant is put to trial after June 13, 1966, *Miranda*'s guidelines are applicable. In response to the question to be answered, the Opinion concluded:

> "All of the reasons set forth above for making Escobedo and Miranda non-retroactive suggest that these decisions should apply only to *trials begun after the decisions were announced.* Future defendants will

benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test. Law enforcement officers and *trial courts* will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to *trials begun after the standards were announced* is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are not obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege. In these circumstances, to upset all of the convictions still pending on direct appeal which were obtained in trials preceding Escobedo and Miranda would impose an unjustifiable burden on the administration of justice" [14] (384 U.S. at 732-733).

The Court drew a line between the cases to which *Miranda* and *Escobedo* would and would not apply. Keeping in mind the Court's stated purpose to avoid the necessity of retrial of numerous prisoners previously found guilty (384 U.S. at 732), the Court held that the two cases' guidelines should not be extended "to cases *tried* before those decisions were announced, even though the cases may still be on direct appeal" (384 U.S. at 733). That consideration has no application to the Petitioner, whose retrial was necessitated by considerations completely divorced from the implications of the *Miranda* decision.

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[14] Emphasis supplied throughout this brief unless otherwise indicated.

In reiterating its conclusion, the Court confirmed that it was the "trial" process to which the new rules applied and not simply a "case" in which some form of trial had commenced prior to the dates of the *Escobedo* and *Miranda* decisions:

> "Because Escobedo is to be applied prospectively, this holding is available only to persons whose *trials* began after June 22, 1964, the date on which Escobedo was decided.
>
> As for the standards laid down one week ago in Miranda, . . . these guidelines are . . . available only to persons whose *trials* had not begun as of June 13, 1966" [15] (384 U.S. at 734).

Indeed, when does a criminal proceeding become a "case" so that, according to the view of the Delaware Supreme Court, the time is fixed for determining *Miranda*'s applicability? When the police officer obtains the questioned statement, either before or after arrest? At the time of a preliminary hearing? Or at all proceedings following indictment, or after arraignment? Is it after commencement of any trial no matter how riddled with error that trial may be? Or is it upon commencement of a trial which, but for *Miranda*, resulted in a verdict of guilty and a judgment which has become final? It is, we suggest, the last alternative.

The prosecution of a criminal defendant calls primarily for guidance of the prosecuting attorney and the trial

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[15] On the same day as *Johnson* was decided, the Court rendered its opinion in *Davis* v. *North Carolina*, 384 U.S. 737, 739, 16 L. Ed. 2d 895, 86 S. Ct. 1701 (1966) in which the court noted that "had the *trial* in this case before us come after our decision in Miranda . . ., we would reverse summarily."

court. The police officer has already done his work, and there is no whisper in the *Johnson* opinion which would support the conclusion that any incriminating statement obtained by a police officer prior to June 13, 1966 without compliance with the *Miranda* standards, may be used in a criminal prosecution conducted after that date. Rather, by holding that the new standards would apply to a criminal defendant tried after June 13, 1966, such a statement would be inadmissible.

That guidance to the police officer and the time of obtaining the statement are of secondary significance here is confirmed by the result reached in *Stovall* v. *Denno*, 388 U.S. 293 (1967) with respect to the *Wade* and *Gilbert*[16] rulings upon a criminal suspect's right to counsel at pretrial identification. In *Stovall*, the Court said:

> "Wade and Gilbert fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel" (388 U.S. at 297).

For purposes of determining the extent of applying the *Wade-Gilbert* rules to pending cases, the Court found not the trial process, but the factors of reliance and administration of justice, as of primary concern:

> "We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case and convictions at various stages

[16] *United States* v. *Wade*, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967) and *Gilbert* v. *California*, 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951 (1967).

of trial and direct review. We regard all factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable" (388 U.S. at 300-301).

The result of giving emphasis to the factors of reliance and of administration of justice was to fix the critical time as that of the confrontation:

> "We hold that Wade and Gilbert affect only those cases which involve confrontations for identification purposes conducted in the absence of counsel after this date" (388 U.S. at 296).

In *Johnson* v. *New Jersey* the Court might have directed that the *Miranda* guidelines should apply only to statements taken after June 13, 1966. But it did not. It might have said that *Miranda* should apply to all cases which were not final. But it did not. It might have said that *Miranda* should control only in cases where no trial of any form had taken place before the decision was announced. But it did not. What the Court *did* do was prescribe in positive terms that the *Miranda* and *Escobedo* standards were applicable to "*trials* begun after the decisions were announced" 384 U.S. at 733, and no distinction was made between the defendant who is tried for the first time and the defendant who is being tried *de novo*, clothed with the same presumption of innocence and entitled to the same constitutional safeguards as all others.

The obvious focus of *Johnson* upon the trial process and the studied use of the word "trial" throughout the opinion have apparently prompted a majority of state

jurisdictions[17] and federal jurisdictions[18] considering the matter to conclude that a retrial subsequent to June 13,

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[17] e.g.,

Alabama: *Smith* v. *State*, 210 So. 2d 826 (Ala., 1968)
Arizona: *State* v. *Brock*, 101 Ariz. 168, 416 P. 2d 601 (1966)
California: *People* v. *Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (1967)
Hawaii: *State* v. *Ruiz*, 49 Haw. 504, 421 P. 2d 305 (1966)
Indiana: *Dell* v. *State*, 231 N.E. 2d 522 (Ind., 1967)
Kansas: *State* v. *McCarther*, 197 Kan. 279, 416 P. 2d 290 (1966)
Kentucky: *Creech* v. *Commonwealth*, 412 S.W. 2d 245 (Ky., 1967)
Rhode Island: *State* v. *Bradshaw*, 221 A. 2d 815 (R.I., 1966)
Wisconsin: *State* v. *Shoffner*, 31 Wis. 2d 412, 143 N.W. 2d 458 (1967)

contra,

Illinois: *People* v. *Worley*, 37 Ill. 2d 439, 227 N.E. 2d 746 (1967)
Maryland: *Boone* v. *State*, 237 A. 2d 787 (Md., 1968)
New Jersey: *State* v. *Vigliani*, 50 N.J. 51, 232 A. 2d 129 (1967)
New York: *People* v. *Sayers*, 22 N.Y. 2d 571, 240 N.E. 2d 540 (1968)
North Carolina: *State* v. *Branch*, 11 N.C. App. 279, 161 S.E. 2d 492 (1968) and *State* v. *Lewis*, 11 N.C. App. 296, 161 S.E. 2d 497 (1968)
Tennessee: *Patten* v. *State*, 426 S.W. 2d 503 (Tenn., 1968)

[18] Third Circuit: *United States* v. *Pinto*, 259 F. Supp. 729 (D.C. N.J. 1966), aff'd per curiam 374 F. 2d 472 (3d Cir. 1967), rev'd on other grds., 389 U.S. 31 (1967); and *Virgin Islands* v. *Lovell*, 378 F. 2d 799 (3d Cir. 1960)
Fourth Circuit: *Moorer* v. *South Carolina*, 368 F. 2d 458 (4th Cir. 1968)
Fifth Circuit: *Gibson* v. *United States*, 363 F. 2d 146 (5th Cir. 1966)
Seventh Circuit: *United States* v. *Phillips*, 401 F. 2d 301 (7th Cir. 1968)
Ninth Circuit: *Amsler* v. *United States*, 381 F. 2d 37 (9th Cir. 1967) and *United States* v. *Young*, 388 F. 2d 675 (9th Cir. 1968).

1966 is governed by the new standards of *Miranda*. Thus, in *United States* v. *Phillips*, 401 F. 2d 301, 306 (7th Cir. 1968), the Court said:

> "We disagree with the government's interpretation of Johnson v. New Jersey. The Supreme Court's selection of the commencement of trial, rather than the arrest of the accused, as the critical point for determining Miranda's retroactive application is significant. It indicates that the Court's concern for fair notice to law enforcement officials focused on notice to the prosecutors rather than notice to the arresting officer . . . We interpret Johnson v. New Jersey as making Miranda applicable to all trials, including retrials, begun after June 13, 1966."

Similar views were expressed by the court in *People* v. *Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (1967):

> "Although the Court in *Johnson* in part justified *Miranda's* prospectivity upon the reliance of law enforcement agencies on cases decided before *Miranda*, the court did not accord decisive importance to the reliance of police officers on prior decisions in planning admissible custodial interrogations. The court afforded the protection of *Miranda* 'to cases in which the trial began after the date of [that] decision' (p. 721, 86 S. Ct. p. 1775); it did *not* hold that statements obtained prior to that date by methods not fully meeting the *Miranda* standard could be used in trials beginning thereafter . . .
>
> In light of the numerous considerations underlying *Miranda*, including 'the necessity for procedures which assure that the individual is accorded his privilege

under the Fifth Amendment to the Constitution not to be compelled to incriminate himself' . . . and the 'possibility of unreliable statements in every instance of in-custody interrogation' . . . , the court in *Johnson* evidently did *not* consider it unduly burdensome to require the prosecution to abstain from use of confessions obtained by methods permitted at the time of trial. . . . The court found an *'unjustifiable* burden of the administration of justice' (italics added) 384 U.S. at p. 733, 86 S. Ct. at p. 1781) only in those situations in which the application of *Miranda* would require reversal of 'convictions * * * which were obtained in trials preceding * * * *Miranda*.' (Ibid.) Thus the specific rule adopted in *Johnson* emanated from the court's expressed reluctance to 'require the retrial or release of numerous prisoners' (p. 731, 86 S. Ct. p. 1780) whose trials were untainted with errors other than a lack of compliance with the later-announced *Miranda* rule.

. . . We recognize, of course that if the prosecution is to comply with *Miranda* upon retrial it may be constrained to forego use of extrajudicial statements elicited prior to June 13, 1966, which would have been admissible under the standards set forth in *Escobedo* and *Dorado*. The burden, however, is no greater than that caused by the prosecution's inability to use statements similarly obtained against a defendant who faces trial for the first time after June 13, 1966. Since the United States Supreme Court in setting its cutoff date did not consider that burden sufficient to outweigh the need for *Miranda* protections at *trials* beginning after June 13, 1966, we must, pursuant to *Johnson*, accord defendant those safeguards upon his second trial."

In the instant case, the Delaware Supreme Court found that in three respects the Petitioner was unfairly and improperly tried. Accordingly, he was given a new trial. Neither *Miranda* nor *Johnson* have any effect upon such a case and the general administration of justice. They are, however, significant in fixing the extent to which the integrity of the trial process will be enhanced.

There is no basis in the language or logic of *Johnson* to distinguish between the defendant who was first tried and the defendant who was given a new trial after June 13, 1966. There is, however, a visible imperfection in a judicial process which would permit two presumptively innocent persons to be arrested at the same time and to be tried for the same offense on the same day in the same courthouse, to be afforded different measures of the guarantee "of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice." 384 U.S. at 729.

## II.

**A Warrantless Search of a Suspect's Residence Based Solely Upon the Consent of a Joint Occupant Is Barred by the Fourth and Fourteenth Amendments Where the Suspect Is Immediately Available to Give or Withhold His Consent.**

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, sup-

ported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Over the past twenty years, this Court's opinions have made it clear that a warrantless search does not meet the requirements of the Fourth Amendment unless it can be demonstrated as being within one of the well-defined "exceptions to the rule that a search must rest upon a search warrant." *Rios* v. *United States*, 364 U.S. 253, 261, 4 L. Ed. 2d 1688, 1693, 80 S. Ct. 1431 (1960).[19] The reason for the requirement is historical[20] but regardless of how that history is viewed, it is accepted that:

> "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment

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[19] See e.g. *Trupiano* v. *United States*, 334 U.S. 699, 92 L. Ed. 1663, 68 S. Ct. 1229 (1948); *United States* v. *Jeffers*, 342 U.S. 48, 96 L. Ed. 59, 72 S. Ct. 93 (1951); *Jones* v. *United States*, 357 U.S. 493, 2 L. Ed. 2d 1514, 78 S. Ct. 1253 (1958); *Chapman* v. *United States*, 365 U.S. 610, 5 L. Ed. 2d 828, 81 S. Ct. 776; *Camara* v. *Municipal Court*, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967); *Stoner* v. *California*, 376 U.S. 483, 11 L. Ed. 2d 856, 84 S. Ct. 889 (1964). There is language in some of this Court's opinions suggesting that the test of validity of a search and seizure is general reasonableness. E.g. *United States* v. *Rabinowitz*, 339 U.S. 56, 94 L. Ed. 653, 70 S. Ct. 430 (1950) and *Cooper* v. *California*, 386 U.S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788 (1967). However, both cases are within an exception to the warrant requirement. The former case involved a search incident to an arrest (see *Jones* v. *United States*, *supra* at page 499) while the latter involved the search of a motor vehicle which, under state law, the police were obligated to seize. Compare *Dyke* v. *Taylor Implement Mfg. Co., Inc.*, 391 U.S. 216, 20 L. Ed. 2d 538, 88 S. Ct. 1472 (1968).

[20] *United States* v. *Rabinowitz*, 339 U.S. 56, 68-70, 94 L. Ed. 653, 661, 662, 70 S. Ct. 430, 436 (1950) (Justice Frankfurter dissenting).

to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent" (*Johnson* v. *United States*, 333 U.S. 10, 14, 92 L. Ed. 436, 440, 68 S. Ct. 367, 369 (1948)).

The exceptions to the requirement "that a search must rest upon a search warrant have been jealously and carefully drawn. . . ." *Jones* v. *United States*, 357 U.S. 493, 499, 2 L. Ed. 2d 1514, 1519, 78 S. Ct. 1253, 1257 (1958). There are special rules relating to the search of motor vehicles, stemming from *Carroll* v. *United States*, 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280 (1925), and permitting a search incident to a valid arrest. *United States* v. *Rabinowitz*, *supra*. The justification for both exceptions is primarily that of necessity. See *Johnson* v. *United States*, 333 U.S. 10, 13-15, 92 L. Ed. 436, 439-441, 68 S. Ct. 367, 368, 369 (1948); *Terry* v. *Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); *Schmerber* v. *California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966). Neither of these exceptions is applicable here.

The third principal exception to the warrant requirement is that of consent to the proposed search and seizure. Apart

from the absence of such persuasive evidence as would translate Miss Marshall's acquiescence to the search into her having knowingly and intentionally relinquished the right to insist upon a warrant, Miss Marshall was not able to waive the Fourth Amendment rights of the Petitioner.[21]

The protection against an otherwise unconstitutional search and seizure may, of course, be effectively waived. However, the burden of establishing the constitutional validity of a waiver is upon the party relying upon that consent. *United States* v. *Jeffers*, 342 U.S. 48, 96 L. Ed. 59, 72 S. Ct. 93 (1951).

In carrying its burden, the government is faced with a presumption against the waiver of constitutional rights. Thus, for a waiver to be effective, "it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart* v. *Janis*, 384 U.S. 1, 4, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966). This presumption is a general one as pertinent to

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[21] Even if the propriety of the search is tested by some general standard of reasonableness, the circumstances incident to the search of Petitioner's home were unreasonable by any yardstick. He was in police custody and immediately available to give or withhold his consent to the search. He had been formally booked upon a patent holding charge of night prowling. He was a "prime suspect" in the homicide investigation then being conducted. He was known by the police officers to reside in the same home with Miss Marshall. Yet, no attempt was made to obtain his consent. Reliance was placed solely upon the consent of Miss Marshall, who was not even charged with a crime. To require the Petitioner's consent or, alternatively, a search warrant, was not "likely to frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court*, 387 U.S. 523, 533, 18 L. Ed. 2d 930, 938, 87 S. Ct. 1727, 1733 (1967). Thus, the search of his house cannot be categorized as reasonable. It may have been more convenient to simply seek Miss Marshall's consent, but convenience is not the constitutional equivalent of reasonableness. *Johnson* v. *United States*, 333 U.S. 10, 15, 92 L. Ed. 436, 441, 68 S. Ct. 367, 369 (1948).

an individual's rights under the Fourth Amendment, see *Bumper* v. *North Carolina*, 391 U.S. 543, 20 L. Ed. 2d 797, 88 S. Ct. 1788 (1968); *Judd* v. *United States*, 190 F. 2d 849 (D.C. Cir. 1951), as it is to those rights arising under the Fifth Amendment.[22]

The Delaware Supreme Court concurred in the view of the trial court that "Miss Marshall's consent to the search was voluntarily given." 230 A. 2d at 270. This determination was apparently based upon the following finding by the trial judge:

> ". . . the only conclusion I can reach . . . is that she didn't know there was anything in the home that she rented that would be of any value to the police. She had, in her own mind at least, nothing to lose by a search of these premises, and to imply under these circumstances that the presence of a badge negates a bare answer 'yes' when asked 'can I search your house?' it seems to me is to apply rules to her testimony which are just too weird for words. Therefore, I hold that the search was reasonable and the evidence will not be suppressed" (Tr. A 151).[23]

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[22] This Court has long remarked upon the intimate relationship between the Fourth and Fifth Amendments. *Boyd* v. *United States*, 116 U.S. 616, 633-634, 29 L. Ed. 746, 6 S. Ct. 524 (1886); *Schmerber* v. *California*, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966). That relationship would appear to require the same degree of understanding and knowledge of one's rights under the Fourth Amendment as *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) requires to support an effective waiver of Fifth Amendment rights. *United States* v. *Moderacki*, 280 F. Supp. 633 (D.C. Del. 1968). See generally, Comment, *Consent Searches: A Reappraisal After Miranda* v. *Arizona*, 67 Col. L. Rev. 130 (1967).

[23] The same result was reached at the second trial (Tr. B 127).

In short, the Delaware courts found that because Miss Marshall felt that a search of the house would not be incriminating as to her and because she was not intimidated by the police, her consent was voluntarily[24] given and therefore constituted an effective waiver of her Fourth Amendment rights. But more was required. Her waiver had to have been knowingly and intentionally made, but it was not.

Taken at its best, the State's evidence does not establish that Miss Marshall had any comprehension of the search warrant process, requiring the determination by an impartial magistrate of whether there was probable cause to justify a search and fixing the permissible scope of the search (A 38). From her viewpoint, Miss Marshall concluded that she had no real choice in giving or withholding her consent (A 32, 84).

Without any evidence to establish even the most minimal comprehension of the Fourth Amendment's protections, the respondent failed to carry its burden in establishing an effective waiver on the part of Miss Marshall.

More fundamental than the constitutional insufficiency of Miss Marshall's waiver of her own rights is whether she also effectively waived the rights of the Petitioner. Relying upon the so-called possession and control rule, the

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[24] The characterization of Miss Marshall's consent as having been voluntary is questionable. The circumstances of her apprehension at the Petitioner's house, her transportation to the police station and the request for permission to search were instinct with coercion. See *Amos* v. *United States*, 255 U.S. 313, 65 L. Ed. 645, 41 S. Ct. 266 (1921); *Bumper* v. *North Carolina*, *supra*. As far as Miss Marshall was aware, she assumed that the police could get a search warrant and it didn't really make any difference whether or not she consented (A 32, 35-36, 84). She consented to the search simply because the police asked her to (A 36).

Delaware Supreme Court held that where one party has joint and equal (or superior) control of the premises, a search conducted pursuant to that party's consent is reasonable and that "evidence that is the product of a reasonable search may be used against anyone." 230 A. 2d at 270-271. In substance, the rule makes the validity of a search turn upon who, between the consenter and non-consenter, has the superior property interest. But as this court has held time and again, "the principal object of the Fourth Amendment is the protection of privacy rather than property, and [we] have increasingly discarded fictional and procedural barriers rested on property concepts." *Maryland Penitentiary* v. *Hayden*, 387 U.S. 294, 304, 18 L. Ed. 2d 782, 790, 87 S. Ct. 1642, 1648 (1967). Nor can the possession and control rule find legitimacy in any concept that Miss Marshall was impliedly authorized by the Petitioner to consent to the search for evidence to be used against him. *Stoner* v. *California*, 376 U.S. 483, 11 L. Ed. 2d 856, 84 S. Ct. 889 (1964).

The "rights assured by the Fourth Amendment are personal rights, and . . . they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons* v. *United States*, 390 U.S. 377, 19 L. Ed. 2d 1247, 1256, 88 S. Ct. 967 (1968). See also *Jones* v. *United States*, 362 U.S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725 (1960); *Katz* v. *United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967); *Mancusi* v. *DeForte*, 392 U.S. 364, 20 L. Ed. 2d 1154, 88 S. Ct. 2120 (1968). And this Court has long recognized that the constitutional safeguards afforded one charged with a crime can only be waived if the party charged—not some third party—so chooses. See *Fay* v.

*Noia*, 372 U.S. 291, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963);[25] *Brookhart* v. *Janis*, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966).

In order for consent to validate the search of an individual's home, that consent must be his and his alone. As the Arizona Supreme Court noted in *State* v. *Pina*, 94 Ariz. 243, 383 P. 2d 167 (1963), "Obviously a third person cannot waive another's basic constitutional rights against unlawful searches and seizures unless specifically authorized."

There is no justification for affording a lesser degree of protection to the individual's rights under the Fourth Amendment than are available to him under the Fifth Amendment. Both are designed to protect the suspect from being compelled to be a witness against himself. Note 22, *supra*. Whatever its modern extensions, the Fourth Amendment has at its core a prohibition of warrantless official entries designed to secure incriminating evidence against a criminal suspect. *Frank* v. *Maryland*, 359 U.S. 360, 364-365, 3 L. Ed. 2d 877, 79 S. Ct. 804 (1959). Thus, it does not follow that, because Miss Marshall might have consented to a search for purposes of obtaining evidence against her, she could consistently with the Fourth Amendment admit a police officer seeking evidence of the Petitioner's guilt.

This Court appeared to speak generally, and not solely with reference to the landlord-tenant situation, when it said in *Stoner* v. *California*, 376 U.S. 483, 488-489, 11 L. Ed. 2d 856, 860, 84 S. Ct. 889, 892, 893 (1964):

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[25] "At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief." 372 U.S. at 439.

"Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' As this Court has said, 'it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . .

It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room."

Nothing more than discredited concepts of relative property rights or an unrealistic determination of apparent authority supports the warrantless search of the Petitioner's home. He might have consented to the search, but he did not. Justification for the search must, therefore, meet the primary criterion of necessity, or, at the very least, a general standard of reasonableness. Neither test is met here. The Petitioner was known to reside in the

house to be searched, was under arrest on one charge and a prime suspect of murder, was physically present in the police station and was immediately available to give or withhold his consent. To sanction the result reached by the court below, is to deprive the suspect who is absent, or taken, from his home of *his* right to be secure from unwarranted official intrusions upon his right of privacy.

## Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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January 2, 1969

# APPENDIX A

## Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.